6a-8a. The court explained that this Court has been "wary of extending *Bivens* remedies into new contexts," particularly when Congress has established a "comprehensive regulatory regime." *Id.* at 6a-7a (citing *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988)). In declining to recognize a *Bivens* remedy here, the court of appeals relied on the fact that Congress has not "explicitly created any direct right of action against USDA employees alleged to have committed constitutional violations"; that the "comprehensive regulatory scheme" established by USDA "includes the right to judicial review under the APA"; and that Congress enacted "a stringent exhaustion requirement for grievances filed against USDA employees" in 7 U.S.C. 6912(e). Pet. App. 7a-8a.

ARGUMENT

1. Petitioner contends (Pet. 12-18) that, on appeal from an order denying qualified immunity, a court of appeals lacks jurisdiction to decide whether a *Bivens* cause of action should be recognized. The court below correctly rejected that claim, and while the law in the Ninth Circuit is arguably to the contrary, it would be premature for the Court to resolve any circuit conflict on the issue at this time. Further review is therefore unwarranted.

a. The doctrine of qualified immunity, which protects public officials who have not violated a clearly established constitutional right, is designed to ensure that "the vigorous exercise of official authority" is not deterred by the threat of personal monetary liability. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 807 (1982). Because that threat arises not only from the risk of a damages award, but also from the burdens of trial and pretrial

proceedings, an order denying qualified immunity is subject to immediate appeal. *Mitchell* v. *Forsyth*, 472 U.S. 511, 524-530 (1985). In *Siegert* v. *Gilley*, 500 U.S. 226 (1991), this Court held that, on appeal of a denial of qualified immunity, a court of appeals is not limited to a determination of whether the constitutional right alleged to have been violated was clearly established. *Id.* at 232. *Siegert* requires a court of appeals to address first the threshold question whether there has been a violation of "a constitutional right at all," *ibid.*, even though the denial of a motion to dismiss for failure to state a claim ordinarily would not be subject to immediate appeal. As the Court explained, resolving that "purely legal question," a "necessary concomitant" to the question whether the right at issue was clearly established, serves the purposes of qualified immunity, by sparing the defendant "not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Ibid.*

For the same reasons, it is appropriate for a court hearing an appeal concerning a claim of qualified immunity to consider the threshold question whether a cause of action is even available under *Bivens*, and thus whether the government-officer defendant is subject to suit at all. As the court of appeals explained, that question is "purely legal"; it is "analytically antecedent to, and in a sense also pendent to, the qualified immunity issue"; it is potentially "dispositive"; and deciding it "serves the interests of judicial economy." Pet. App. 5a-6a (quoting *Drake* v. *Scott*, 812 F.2d 395, 399 (8th Cir.), aff'd on reh'g, 823 F.2d 239 (8th Cir.), cert. denied, 484 U.S. 965 (1987)). Cf. *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 204-205 (1996) (under 28 U.S.C. 1292(b), court of appeals can exercise jurisdiction over

any issue fairly included within certified order). The court of appeals correctly recognized that federal officers should not be burdened with "the cost and time of litigating a lawsuit which, if no *Bivens* remedy exists, is doomed from its inception." Pet. App. 6a.

b. Petitioner contends (Pet. 14-18) that the court of appeals' decision on the jurisdictional issue conflicts with decisions of the Seventh and Ninth Circuits. The Seventh Circuit case on which petitioner relies, however, did not present the question whether, on appeal from a denial of qualified immunity, the court of appeals has jurisdiction to consider whether a *Bivens* cause of action exists. That case, an action against state officials under 42 U.S.C. 1983, was a qualified-immunity appeal in which the court of appeals was asked to decide a statute-of-limitations issue and an issue of standing, neither of which had any bearing on the facial validity of the complaint or whether the defendant was subject to suit at all. *Triad Assocs., Inc.* v. *Robinson*, 10 F.3d 492, 496 n.2 (7th Cir. 1993). The Ninth Circuit case on which petitioner relies, *Kwai Fun Wong* v. *United States*, 373 F.3d 952 (2004), did address the question whether the court had jurisdiction in a qualified-immunity appeal to decide whether a *Bivens* cause of action exists, *id.* at 961, but the court's conclusion that it did not was not necessary to the disposition of the case, because the Ninth Circuit ultimately held that the plaintiffs had not alleged the violation of a clearly established constitutional right, and that the defendants were therefore entitled to qualified immunity, *id.* at 966-977. Strictly speaking, therefore, the Ninth Circuit's resolution of the jurisdictional issue in *Kwai Fun Wong* was dictum, and future panels of the Ninth Circuit may treat it as such. The Ninth Circuit reached the same conclusion in an earlier case, *Pelletier*

v. *Federal Home Loan Bank*, 968 F.2d 865, 871 (1992), but an aspect of the court's resolution of the jurisdictional issues in *Pelletier* was rejected by this Court as reflecting an unduly narrow view of the law, see *Behrens* v. *Pelletier*, 516 U.S. 299, 308-309 (1996). It is possible, therefore, that future panels of the Ninth Circuit will be reluctant to follow the decision insofar as it addressed the question presented here.[1]

Even if the rule in the Ninth Circuit is in fact contrary to the rule adopted by the Eighth Circuit in this case, it would be premature for the Court to grant certiorari at this time. As evidenced by the relatively few decisions that have considered the issue, the jurisdictional question in this case does not appear to arise with much frequency.[2] If the Ninth Circuit holds in a future qualified-immunity case that it has no jurisdiction to decide whether a *Bivens* cause of action exists, the federal-officer defendants can petition for rehearing en banc, and, if they prevail, any circuit conflict will be eliminated.[3] That would obviate the need for review by this Court. And regardless of whether the Ninth Circuit addresses the question en banc, "further consideration

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[1] *Kwai Fun Wong* was cited in a recent Ninth Circuit case, *Sissoko* v. *Rocha*, 412 F.3d 1021, 1028 (2005), but the reason the court declined to consider whether a *Bivens* cause of action existed in *Sissoko* was that the question was not decided by the district court or certified for interlocutory appeal, *ibid.*

[2] As far as we are aware, the only other court of appeals to address the question is the Tenth Circuit, which, in a 1989 decision, reached the same conclusion that the Eighth Circuit reached here. *Hill* v. *Department of the Air Force*, 884 F.2d 1318, 1320, cert. denied, 495 U.S. 947 (1990).

[3] The defendants in *Kwai Fun Wong* had no occasion to petition for en banc review on the jurisdictional issue, because the Ninth Circuit's decision on qualified immunity made them the prevailing parties.

* * * of the problem by other courts will enable [this Court] to deal with the issue more wisely at a later date." *McCray* v. *New York*, 461 U.S. 961, 962 (1983) (opinion of Stevens, J., respecting the denial of certiorari).[4]

2. Petitioner also contends (Pet. 18-26) that it has a *Bivens* cause of action against respondents. The court of appeals correctly held otherwise, and its decision on that point does not conflict with any decision of any other court of appeals. Further review on that question is therefore unwarranted as well.

a. In *Bivens*, this Court recognized a cause of action for damages against federal law-enforcement agents who allegedly violated the plaintiff's Fourth Amendment rights. The Court's more recent decisions, however, "have responded cautiously to suggestions that *Bivens* remedies be extended into new contexts." *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 68-69 (2001) (quoting *Schweiker* v. *Chilicky*, 487 U.S. 412, 421 (1988)). The Court has emphasized that the "absence of statutory relief for a constitutional violation . . . does not by any means necessarily imply that courts should award money damages against the officers responsible for the violation." *Id.* at 69 (quoting *Schweiker*, 487 U.S. at 421-422). To the contrary, when "the design of a

[4] There is no need to hold the petition pending this Court's decision in *Will* v. *Hallock*, cert. granted, 125 S. Ct. 2547 (2005). The question presented in that case is whether the "judgment bar" of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2676, prevents an unsuccessful FTCA claimant from bringing a *Bivens* action against the federal employee whose acts gave rise to the FTCA claim, and this Court has directed the parties to address the additional question whether an order denying a motion to dismiss on the basis of the judgment bar is immediately appealable. The jurisdictional issue in *Will* v. *Hallock*, *supra*, thus does not involve a qualified-immunity appeal.

Government program suggests that Congress has provided what it considers adequate remedial mechanisms for constitutional violations that may occur in the course of its administration," the Court has not created additional remedies under *Bivens*. *Schweiker*, 487 U.S. at 423. Thus, in *Bush* v. *Lucas*, 462 U.S. 367 (1983), the Court refused to create a *Bivens* cause of action for federal employees seeking to challenge personnel decisions even though "existing remedies [did] not provide complete relief," *id.* at 388, and there was no remedy at all for short suspensions or adverse personnel actions against probationary employees, *id.* at 385 n.28.

The court of appeals correctly applied these principles in holding that the comprehensive scheme for review of actions by federal food-safety inspectors under the FMIA precludes the creation of a *Bivens* cause of action against the inspectors personally. Congress has provided through the APA the means of raising challenges—including constitutional challenges—to the type of agency actions at issue here. See 5 U.S.C. 706(2)(B). Final agency action (such as a suspension) is subject to judicial review; review of non-final action (such as an NR) is precluded by congressional design. See, *e.g.*, *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997); see also *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 131 (1939) ("ever since the first Judiciary Act, Congress has been loath to authorize review of interim steps in a proceeding"). Judicial review is based on the record compiled before the agency. See *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-744 (1985). And under 7 U.S.C. 6912(e), exhaustion of administrative remedies is a prerequisite to APA review. The court of appeals correctly recognized that creating a *Bivens*

cause of action under these circumstances would circumvent the statutory constraints on judicial review of the agency's actions.

b. Contrary to petitioner's contention (Pet. 19-20), no court of appeals has reached a contrary conclusion. Indeed, no other court of appeals has addressed the question presented here. That includes the Sixth Circuit, in *Krusinski* v. *USDA*, No. 92-4026, 1993 WL 346858 (Sept. 10, 1993) (4 F.3d 994) (per curiam), the case on which petitioner principally relies (Pet. 19-20). Although a *Bivens* action against USDA inspectors was allowed to proceed in *Krusinski*, the Sixth Circuit did not address the question whether the cause of action was precluded by the statutory scheme, and there is no indication in the opinion that any such argument was even made. In any event, *Krusinski* is an unpublished decision and therefore is "not binding precedent." *Bell* v. *Johnson*, 308 F.3d 594, 611 (6th Cir. 2002).

Nor does the other court of appeals decision on which petitioner relies (Pet. 20), *Love* v. *United States*, 915 F.2d 1242 (9th Cir. 1990), conflict with the decision below. In *Love*, which involved a challenge to the liquidation of farm property after the plaintiffs defaulted on an agricultural loan, the Ninth Circuit held only that the availability of a remedy against the United States under the Federal Tort Claims Act, 28 U.S.C. 2671-2680, did not prevent the plaintiffs from suing employees of USDA's Farmers Home Administration under *Bivens* as well. 915 F.2d at 1248-1249 (citing *Carlson* v. *Green*, 446 U.S. 14 (1980)). Like *Krusinski*, *Love* did not address the question whether the applicable regulatory scheme precluded recognition of a *Bivens* cause of action, and it certainly did not address the question whether that was true of the regulatory scheme *at issue here*, because the

case did not involve the inspection of meat-processing plants.

Petitioner also relies (Pet. 20, 24, 25-26) on a number of district court decisions. But only two of them, *Sheehy* v. *Wehlage*, No. 02-CV-592A, 2004 WL 951367 (W.D.N.Y. Feb. 3, 2004), and *Veal Connection Corp.* v. *Thompson*, No. C 96-04486 CW (N.D. Cal. Dec. 12, 2001), involved a *Bivens* action against USDA inspectors, and in those cases, as in *Krusinski* and *Love*, there is no indication that the court addressed the question presented here. In any event, any conflict between a district court decision and the decision below would not provide a basis for certiorari. See Sup. Ct. R. 10.

Finally, petitioner relies (Pet. 21) on USDA's policy on employee indemnification, 7 C.F.R. 1.501. But publication of that policy hardly presupposes, as petitioner contends, that "the agency itself" has been unable to "form a consensus" on "whether a *Bivens* remedy exists" in a case of this type. Pet. 21. The policy applies to all USDA employees (not merely food-safety inspectors), and simply reflects the agency's recognition that "actions against Federal employees in their personal capacity," if they are recognized in particular contexts, tend to "intimidate employees" and "stifle creativity," thereby "hinder[ing] the Department's effectiveness." *Indemnification of Department of Agriculture Employees*, 69 Fed. Reg. 28,041 (2004). This Court made a similar observation in declining to recognize a *Bivens* cause of action in *Schweiker* v. *Chilicky*, *supra*, where it noted that "[t]he prospect of personal liability for official acts * * * would undoubtedly lead to new difficulties and expense in recruiting administrators for the programs Congress has established." 487 U.S. at 425.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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No. 04-1611

In the Supreme Court of the United States

NEBRASKA BEEF LTD., PETITIONER

v.

DENNIS GREENING, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE RESPONDENTS

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Pursuant to Rule 15.8 of the Rules of this Court, the Solicitor General, on behalf of respondents, respectfully calls the Court's attention to an intervening matter not available when the brief in opposition was filed.

The second question presented in the petition is whether, on appeal from an order denying qualified immunity, a court of appeals has jurisdiction to consider whether a cause of action should be recognized to subject the government-officer to suit under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). In *Hartman* v. *Moore*, cert. granted, No. 04-1495 (June 27, 2005), the Court will decide whether law enforcement agents may be liable under *Bivens* for retaliatory prosecution in violation of the First Amendment when the prosecution was supported by probable cause. In the merits brief in

Hartman, which was filed on August 26, 2005, the federal law enforcement officer-petitioners argue that a criminal defendant has no right under the First Amendment to be free from a prosecution supported by probable cause that was motivated by the defendant's speech. 04-1495 Pet. Br. 19-36. The *Hartman* petitioners also point out that, if the Court wished to reserve the broader First Amendment question, it could decide the case on the narrower ground that the absence of probable cause is an element of a damages cause of action for retaliatory prosecution under *Bivens*. *Id.* at 36-37. In a footnote, the *Hartman* brief notes that limiting the holding to the context of a *Bivens* cause of action could implicate the jurisdictional question that is presented in this case (because *Hartman*, too, was an appeal from an order denying qualified immunity). *Id.* at 37 n.12. The footnote goes on to say that, although courts have provided different answers to the jurisdictional question, the decision of the court of appeals in this case is correct. *Ibid.*

There is no need for the Court to hold the petition in this case pending its decision in *Hartman*. First, the principal issue in *Hartman* is the broader issue of whether the respondent has a claim under the First Amendment at all. The Court would have no need to reach the jurisdictional question in that case unless it limited its holding to the *Bivens*/Section 1983 context. Second, the court of appeals in this case correctly held that there is no cause of action under *Bivens*. See Br. in Opp. 10-13. The ultimate outcome is therefore likely to be the same regardless of whether the court of appeals should have decided that question on appeal from an order denying qualified immunity.

Respectfully submitted.

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